IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 735 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

MINUBHAI JAMSHEDJI ITALIA - Petitioner(s)
Versus
MAMLATDAR & ALT CHIKHALI & 6 - Respondent(s)

==========

Appearance :
MR JB PARDIWALA for Petitioner(s) : 1,
RULE SERVED for Respondent(s) : 1 - 3.
MR AB MUNSHI for Respondent(s) : 4 - 6.
MR DC DAVE for Respondent(s) : 7,

==========

CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 15/11/2006

ORAL JUDGMENT

1. The short facts of the case appear to be that the proceedings under Section 32FF of the Bombay Tenancy and Agricultural Lands Act (hereinafter

referred to as “the Act”) were initiated for the land admeasuring 5 acres and 13 gunthas bearing Survey No.1164 at village Sadad Vel, Dafri Falia, Taluka Chikhli. The order dated 20th September, 1978 was passed in the said case, whereby it was decided to initiate the proceedings under Section 32(1)(B) of the Act. It appears that the depositions were recorded of the legal heirs of the original tenant namely; Rasuliben widow of Mehrvan Visal on 6.4.1983 as well as on 13.7.1984. However, thereafter vide order dated 13.7.1984 it was decided to close the proceedings. The mater was taken in suo motu revision by the Dy. Collector and as per the order dated 13th November, 1988 the order of the Mamlatdar was set aside and the case was remanded to the Mamlatdar for consideration. It appears that before the Mamlatdar and ALT, after remand, the date of hearing was fixed, but the petitioner did not remain present and the Mamlatdar proceeded ex parte. On the date fixed i.e. 15.1.1990, the deposition was recorded again of the claimant/legal heirs of the tenant

and the Mamlatdar passed the order on 20.1.1990, whereby it was found that the tenant was unlawfully dispossessed and on the relevant date i.e. on 15.6.1955, the tenant was in possession and, therefore, entitled to get the possession of the land and consequential order was also passed. It appears that pending the proceedings, the petitioner transferred the land to respondent No.7 on or about 5.8.1989. Such factum was not brought to the notice of the Mamlatdar. The matter was carried before the Dy. Collector by preferring appeal being Appeal No.53/1990 by the petitioner herein and the said appeal, as per the order dated 22.1.1991, was dismissed. The matter was further carried the before the Tribunal by the petitioner being Revision Application No.129/1991 and the Tribunal also dismissed the revision as per its decision dated 11.7.1997. It is under these circumstances the petitioner has approached this Court by preferring the present petition.

2. Heard Mr.Pardiwala, learned Counsel for the petitioner, Mr.Desai, learned AGP for

respondents No.1, 2, and 3, Mr.Munshi, learned Counsel for respondents No.4, 5, and 6 and Mr.Rakesh Patel, learned Counsel for respondent No.7.

3. It appears that through out in the proceedings before the lower authority, including upto the Tribunal, there is no consideration of the depositions of the legal heirs of the tenant namely; Rasuliben dated 6.4.1983 as well as dated 13.7.1984, which came to be recorded before the order dated 13.7.1984 was passed by the Mamlatdar for closure of the proceedings under Section 31 of the Act. A copy of the depositions is produced by the petitioner in the record of this petition and the same, inter alia, shows that as per the deposition dated 6.4.1983, which has been stated by Ms.Rasuliben Mehrvan Visal that the possession of the land was entrusted to the landlord since last seven to eight years and the possession is surrendered. Thereafter in the very deposition it has been subsequently stated that at that time her son was 10 years old and, therefore,

the possession was handed over in the year 1950 and the approximate period shown was 52 to 53 years. In the deposition dated 13.7.1984 it has been stated in the examination-in-chief that the husband of the deponent, was working on labour basis and the amount of labour was paid in cash and receipt was not taken or was not being issued for such payment. It is also stated that if the land was given by the Government under the Tenancy Act to her she was not happy and she was given to understand that under the Tenancy Act, she may get land. In the order of the Mamlatdar and ALT dated 20.1.1990, there is no reference whatsoever to such deposition, nor the Mamlatdar has considered the same and has discarded the deposition recorded. The order of the Mamlatdar dated 20.1.1990 proceeds on the basis of the deposition recorded on 15.1.1990. Therefore, as such it can be said that if the material pieces of evidence are not at all considered by the quasi judicial authority while exercising the power, the jurisdictional error is committed.

4. Mr.Munshi, learned Counsel appearing for the legal heirs of Respondents No.4, 5 and 6 attempted to submit that as the order was passed by the Dy. Collector for remand, the matter was to be considered *de novo* and the evidence recorded earlier was not required to be considered. I am afraid such contention can be accepted in absence of any authenticated record produced for such purpose. Apart from the above, in normal circumstances, when the matter is remanded to the lower authority by the higher authority after setting aside of the order, the evidence on record would not go away. While passing the final order, it is required for the authority to consider the same, may be after comparing or after appreciation of the subsequent evidence on record, but non-consideration of the same can be said as an error apparent on the face of record. Therefore, Mr.Munshi is not right in submitting that only subsequent deposition was required to be considered, which was recorded on 15.1.1990 and not prior thereto.

5. Mr.Munshi, learned Counsel appearing for Respondents No.4, 5 and 6, by referring to the decision of the Dy. Collector, submitted that the Dy. Collector in the order dated 22.1.1991 in Appeal has not accepted the statement of cultivation as labour, since the name of tenant was recorded in the village Forms No.7 and 12. Even if such aspect is considered, then also the fact remains that the deposition dated 6.4.1983 of voluntarily surrendering the possession and that at the time when the son of the deponent was 10 years and an approximate period shown was 52 to 53 years are not considered. Therefore, the jurisdictional error for non-consideration of the evidence did continue even at the stage when the Dy. Collector considered the matter while hearing the appeal.

6. At the stage of hearing the matter before the Tribunal, there was no discussion in the reasoning of the Tribunal to the evidence recorded earlier and referred to hereinabove. The Tribunal has on the contrary, recorded the finding that the possession of the suit land was

continued up to 1978-79 till the tenant was alive. The said finding, as it is, cannot be said as valid since the Tribunal has come to the aforesaid conclusion of possession up to 1978-79 without considering the evidence/deposition recorded on 6.4.1983 and 13.7.1984. Therefore, even at the stage of the revision before the Tribunal, there is no consideration of the aforesaid material piece of evidence on record. Apart from the above, during the course of hearing before the Tribunal, it came on record that the landlord has transferred the property on or about 5.8.1989 to the third party, who is respondent No.7 herein and the said factum was also recorded by the Tribunal while reproducing the written argument of the opponent tenant before the Tribunal. It was required for the Tribunal to direct the parties to the proceedings or the petitioner, at least, to implead the person, who acquired the right in the property with a view to pass proper, effective order. It is an admitted position that neither respondent No.7 was joined as

party, nor was heard by the Tribunal in spite of the fact came on record that the transfer had taken place. The additional aspect, which was required to be considered by the Tribunal was the effect on the proceedings under Section 31B in the event the status of the land is changed from agricultural to non-agricultural, which came on record in the written submission made on behalf of the tenant, which has been reproduced, by the Tribunal at para 5 that even as per the respondents No.4, 5, and 6, the opponents before the Tribunal, the non-agricultural operations were being carried out over the suit land. There is no discussion whatsoever to the said aspects in the reasoning, nor is the same dealt with by the Tribunal, more particularly on the aspects as to whether the provisions of the Act would continue to apply and the effective order for entrustment of the possession to the tenant for agricultural purpose can be ordered or not.

7. In view of the aforesaid, it appears that as such the jurisdictional error is committed by all the authorities through out. However, the

Tribunal while exercising revisional jurisdiction can consider the material piece of evidence so as to avoid miscarriage of justice and as the matter is of 1978 onwards, I find that it would be just and proper to remand the matter to the Tribunal to reconsider the same after taking into consideration the evidence on record and the appreciation thereof.

8. Mr.Pardiwala, learned Counsel appearing for the petitioner, relied upon the decision of the Apex Court in case of **Dhondiram Tatoba Kadam v. Ramchandra Balwantrao Dubal", reported in 1994(3) SCC, 366,** whereas Mr.Munshi, learned Counsel appearing for respondents No.4, 5, and 6 by replying upon the subsequent decision of the Apex Court in case of **Babu Parasu Kaikadi (Dead) By LRS. v. Babu (Dead) Through LRS.", reported in 2004(1) SCC, 681** contended that in view of the said decision of the Apex Court the earlier decision of the Apex Court in case of **"Dhondiram Tatoba Kadam" (supra)** is held as per curium and he submitted that if the possession is not taken over over by the landlord without following the

mandatory procedure, the tenant or the legal heirs of the tenant would be entitled to the restoration of the possession under Section 32(1)(B) of the Act. In my view, it is not necessary to conclude the matter on said that aspects, because for applicability of the said decision, it would be required for the lower authority to reach at the finding of facts that on the appointed date i.e. 1955 the possession of the tenant had continued and the dispossession is thereafter, after taking into consideration the above two referred material pieces of evidence. Therefore, suffice it to say that either party may raise the contentions, as may be available in law before the Tribunal as and when the matter is reconsidered.

9. In view of the above, the impugned order passed by the Tribunal dated 11.7.1997 is quashed and set aside with the directions to the Tribunal to re-hear the matter in light of the observations made by this Court in this judgement and decide the same as early as possible, preferably within a period of six months from the date of receipt

of the order of this Court, after giving opportunity of hearing to all concerned.

10. The petition is allowed to the aforesaid extent. Rule partly made absolute. Considering the facts and circumstances, there shall be no order as to costs.

15.11.2006 **(Jayant Patel, J.)**

vinod